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UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of : April 28, 2009
LISZIEWICZ, et al. : Atty Docket No. RGT 9771
Serial No. 10/081,922 : Group 1632
Filed: 15 September 1998 : Examiner: Wilson

**For: Method of Delivering Genes into Antigen
Presenting Cells of the Skin**

Mail Stop – Appeal Brief
Commissioner of Patents
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Alexandria, VA 22313-1450

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**RESPONSE TO NOTIFICATION OF NON-COMPLIANT
APPEAL BRIEF¹**

In response to the Office Action bearing a mail date of April 3, 2008, the Applicants note that the Appeal Brief was filed under the Rules published June 10, 2008 and withdrawn Dec. 10, 2008, just before the due date for the referenced Brief. The Applicant has reviewed the applicable Rules, and notes that the Brief does conform to them. Further, the Applicants note that the USPTO has made a commitment to refrain from lodging objections to the Brief filed under the June 10, 2008 Rules.

Respectfully Submitted,

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¹ This paper is being forwarded by fax to the Commissioner of Patents, P.O. Box 1450 Alexandria, VA 22313-1450 on April 28, 2009. Signed Valerie E. Looper *Valerie E. Looper*

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REMARKS

The federal register announcement <http://edocket.access.gpo.gov/2008/pdf/E8-29297.pdf> states that in the December 10, 2008 edition of the Federal Register, the USPTO published an announcement noting that the final rule relating to practice before the Board of Patent Appeals and Interferences (BPAI) in ex parte appeals will not take effect on December 10 as originally scheduled. New effective and applicability dates will be identified in a subsequent announcement. The announcement further stated that, in the interim, the USPTO will continue to accept appeal briefs in either the current format, or the new format as outlined in the final rule.

In addition to the comments based on the difference between the two sets of allowable rules, the Examiner also comments that the Evidence Appendix is in error. This is untrue. This case was filed with experimental evidence demonstrating patentability, which the Examiner has failed to consider. Thus, this evidence falls in the category of "other evidence" required under Bd.R.41.37(t). Supplemental evidence was filed in the case, *including evidence that the referenced invention is in human clinical trials*, which the Examiner also refused to consider. Accordingly, all supplemental evidence has been withdrawn from the case, and the Applicants rely on the evidence found in the application as written. The Examiner's attempt to mischaracterize this evidence as attorney argument is a fundamental error of law that has no place in normal patent prosecution before the United States Patent and Trademark Office.

With respect to the specific items on the Notice:

1. The brief does contain the items required, under the required headings, and in the proper order, the Examiner's citation to the wrong set of rules notwithstanding.
2. The brief does contain a statement of the status of all claims, the Examiner's mischaracterization of objections as rejections notwithstanding.
4. The brief does contain a concise explanation of the subject matter defined in each of the independent claims, as required under the applicable rules. There are no means-plus-function claims, and correspondence to the application is laid out with reference to page and line numbers. The citation to the application is appropriate because this application

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was filed with experiments demonstrating patentability, which the Examiner has failed to treat as evidence.

7. The brief contains a correct copy of the appealed claims, the Examiner's mischaracterization of objections as "rejections" notwithstanding.

8. The brief contains appropriate citation to evidence of record relied upon by the appellant on appeal. The Examiner had refused to accept the evidence in the application, and the applicants had submitted supplemental evidence, including publications by themselves and others, and evidence that the claimed inventions are in *human clinical trials*. Accordingly, all such supplemental evidence has been withdrawn by the applicants, and the applicants will rely on the experimental evidence in the text of the application.

9. The allegation that any part of this brief is missing under the appropriate Rules is false.

With respect to the Examiner's specific comments:

- A. The "jurisdiction" section is required under Bd. R. 41.37(h) and § 41.37(h).
- B. The "Table of Contents" section is required Bd. R. 41.37(e) and § 41.37 (i).
- C. The "Table of Authorities section is required Bd. R. 41.37(e) § 41.37(j).
- D. The "Status of Pending Claims" section was specifically not required. § 41.37(j)
- E. The "Summary of Claimed Subject Matter section was specifically not required. § Bd. R. 41.37(e) and § 41.37(e)
- F. The "Statement of Facts" Section is required. § Bd. R. 41.37(e) and § 41.37(e)
- G. The Examiner's invitation to erroneously class objections as rejections is declined.
- H. The Claims Support Appendix is required. § Bd. R. 41.37(e) and § 41.37(r).
- I. The Drawing Analysis Appendix is required. § Bd. R. 41.37(e) and § 41.37(r).
- J. The Evidence Appendix, as written is required. § Bd. R. 41.37(e) and § 41.37(t) (6).
- K. The Related Cases Appendix is required. § Bd. R. 41.37(e) and § 41.37(e).

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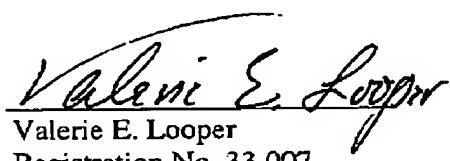
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Conclusion

The present brief is in compliance with the final rule that was to take effect shortly before the due date for the present Appeal Brief, and compliance with the Examiner's comments would take the brief out of compliance with that rule.

Respectfully Submitted,



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